Categorical Exclusions under Section 390 of the Energy Policy Act of 2005

Energy Policy Act of 2005 Categorical Exclusions (CX) are listed below followed by a short explanation statement.

1. *Individual surface disturbances of less than five (5) acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to* the National Environmental Policy Act (*NEPA) has been previously completed.*

   Ties to a site-specific NEPA document and surface disturbance for each individual action is less than 5 acres, and there is no more than 150 acres of disturbance per individual lease, even if the lease is part of a multi-lease unit.

2. *Drilling an oil and gas well at a location or well pad site at which drilling has occurred within five (5) years prior to the date of spudding the well.*

   A new well can be drilled on an old well pad within 5 years of the previously drilled well.

3. *Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five (5) years prior to the date of spudding the well.*

   Ties to a more general RMP/EIS or other NEPA document, less than 5 years old, which analyzed drilling as a reasonably foreseeable activity that considered the proposed wells. Development must occur in an existing field containing a confirmation well (confirms the oil or gas resource exists in paying quantities).

4. *Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five (5) years prior to the date of placement of the pipeline.*

   Allows placement of a pipeline within any type of existing right-of-way provided the last use of the corridor was approved within 5 years. The pipeline can be off-lease, but it must be a pipeline authorized under the Mineral Leasing Act (MLA).

5. *Maintenance of a minor activity, other than any construction or major renovation o[f] a building or facility.*

   Covers basic maintenance.

Key Points:

- The Section 390 Categorical Exclusions are not traditional CXs.

- The Section 390 CXs are not subject to the 12 “extraordinary circumstances” that apply to the Department of Interior Bureaus.

- The CXs exclude the proposed actions from the need to conduct additional NEPA analysis. All exclusions contemplated some type of previous NEPA analysis.

- The most common exclusion for Application for Permit to Drill (APD) approval may be #3. However, #3 has a definite 5 year time limit that will require Field Offices to update their field wide Environmental Assessments (EAs) or Environmental Impact Statements (EISs) if they are to continue using this categorical exclusion. We anticipate multiple well (Plan of Development – “POD”) EAs will become more common as the full field development and land use planning documents begin to age beyond 5 years.

- The new Categorical Exclusions only apply to environmental analyses required by the National Environmental Policy Act. BLM must still comply with the National Historic Preservation Act (NHPA), the Endangered Species Act, and other applicable environmental statutes. Compliance with these statutes will have to be accomplished independent of the BLM NEPA process when a project qualifies for one of the new CXs,.

- When a CX is used, BLM must continue to: conduct onsite inspections and interdisciplinary staff review; apply appropriate Best Management practices and APD conditions of approval; and comply with leasing stipulations and land use plan decisions.

- Field offices are expected to continue to maintain an interdisciplinary APD review process.

- For each proposed action, document and use as many of the CXs as are applicable.

Questions & Answers Related to Statutory Categorical Exclusions under Section 390 of the Energy Policy Act of 2005

Statutory Categorical Exclusions under Section 390 of the Energy Act of 2005

CX #1) Individual surface disturbances of less than 5 acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to the National Environmental Policy Act (NEPA) has been previously completed.

CX #2) Drilling an oil or gas well at a location or well pad site at which drilling has occurred previously within 5 years prior to the date of spudding the well.

CX #3) Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well.

CX #4) Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within 5 years prior to the date of placement of the pipeline.

CX #5) Maintenance of a minor activity, other than any construction or major renovation of a building or facility.

General Questions

(1) Question: Does 43 CFR 3162.5-1 require the preparation of an "environmental record of review" when one of the statutory categorical exclusions (CX) applies?

Answer: No. The regulation only requires the preparation of an environmental record of review "as appropriate." Such a record is not appropriate in light of Section 390 of the Energy Policy Act (the Act).

(2) Question: Do you need to document use of a statutory CX?

Answer: Yes. Document which statutory CX(s) was used and how the specific requirements for using the statutory CX(s) are/were met.

(3) Question: Can Conditions of Approval (COAs)/Best Management Practices (BMPs) be attached to a CX without further justification through a NEPA document?

Answer: Section 17 of the Mineral Leasing Act (MLA) gives the Bureau of Land Management (BLM) authority to impose COAs, such as BMPs, without NEPA analysis when BLM is excused from NEPA analysis by a categorical exclusion.

(4) Question: Can the application of a statutory CX be appealed?

Answer: A party appealing a decision on a proposed action can dispute whether the statutory CX was properly applied. Documentation of the use of a statutory CX will be an important part of the record reviewed for the action under appeal.

(5) Question: What level of detail must be in the existing NEPA document to support the application of a statutory CX?

Answer: The document used to support CX #1 must contain site-specific details. The document used to support CX #3 only has to consider and analyze the contemplated drilling as a "reasonably foreseeable activity."

(6) Question: Assuming that the level of impacts analyzed has been exceeded, will a statutory CX that depends upon an existing NEPA document still apply?

Answer: Additional NEPA documentation is required if the development foreseen exceeds the impacts analyzed in the existing NEPA document.

(7) Question: Do we have to use the statutory CXs?

Answer: If a CX applies, it should be used. In some situations, the use of Documentation of NEPA Adequacy (DNA) can provide a more appropriate and expanded administrative record without slowing the approval process. The use of DNAs as an alternative to the statutory CXs should be at the discretion of the Field Manager. If this flexibility begins to slow the process or is used routinely in lieu of appropriate statutory CXs, that flexibility can be narrowed or reduced in subsequent Instruction Memorandum (IM).

(8) Question: Do extraordinary circumstances as defined in 516 of the Departmental Manual (DM) apply when a statutory CX is used?

Answer: No. Statutory CXs are not subject to the extraordinary circumstances provisions in 516 DM. However, Section 390 of the Act does not eliminate the requirements of other statutes, such as the Endangered Species Act, the National Historic Preservation Act, Clean Water Act, etc.

(9) Question: Can geophysical activities for data collection by a non-lessee qualify under these statutory CXs?

Answer: CX #1 would apply so long as there is less than 5 acres of surface disturbance, overall surface disturbance is not greater than 150 acres, and the proposed activity has been previously subject to site-specific NEPA analysis.

(10) Question: Does the Forest Service (FS) injunction resulting from the *Earth Island Institute* case apply to these statutory CXs?

Answer: No. The injunction only applies to the FS appeals process.

(11) Question: What do we do if the IM 2005-247 definition of a "minor activity" conflicts with a Resource Management Plan (RMP) definition?

Answer: The IM definition of "minor activity" for the statutory CXs is to be used when a statutory CX is used. The RMP definitions were not established for this purpose.

Surface and Mineral Estate Questions

(12) Question: Section 390 of the Act refers to public lands. Do the statutory CXs apply to split estate?

Answer: Yes. The statutory CXs apply to split estate lands where the oil and gas estate is federally owned and leaseable under the MLA.

(13) Question: Do the statutory CXs apply to FS lands? If yes, who is responsible for documenting the use of the statutory CX(s)?

Answer: Section 390 of the Act applies to both the FS and the BLM. The BLM and FS are both responsible for keeping their own administrative records for use of a statutory CX.

(14) Question: Do the statutory CXs apply to Indian leases?

Answer: No.

Categorical Exclusion #1 Questions

(15) Question: CX #1 states that the proposed action must be within the general boundary of the parent NEPA document. Does this mean it can be outside of that boundary? If so, how far?

Answer: CX #1 only applies to drilling within the area analyzed in a prior NEPA document. The proposed action cannot be located outside the area previously analyzed.

(16) Question: What constitutes a site-specific NEPA document for CX #1?

Answer: A site-specific NEPA document may be an exploration and/or development Environmental Assessment (EA)/Environmental Impact Statement (EIS), an EA/EIS for a specific Plan of Development (POD), a multi-well EA/EIS, or an individual permit approval EA/EIS. The site-specific NEPA document must have analyzed the exploration and/or development of oil and gas (not just leasing) and the action/activity being considered must be within the boundaries of the area analyzed in the EA or EIS.

(17) Question: How is the 150-acre limit of surface disturbance calculated for CX #1?

Answer: The 150-acre surface disturbance calculation includes disturbance associated with oil and gas activities and associated Rights-of-Ways (ROWs) regardless of surface ownership. It does not include surface disturbance from other activities. Areas disturbed for oil and gas operations that have been successfully reclaimed and meet final reclamation standards do not count towards the 150-acre surface disturbance limit. Successfully reclaimed surface disturbance is considered to be undisturbed land.

(18) Question: If the surface disturbance predates a current lease holder's interest in a lease, does that unreclaimed surface disturbance count in the 150-acre calculations?

Answer: Yes.

(19) Question: Does the 5-acre surface disturbance threshold limit described in CX #1 defeat the purpose of using a POD or batching Applications for Permit to Drill (APD) for processing and approval?

Answer: The 5-acre threshold limit applies to each individually approved activity, such as an APD approval. It does not apply to a POD. If a POD has 20 wells, the statutory CX is to be applied 20 times for a maximum allowable disturbance of 100 acres.

(20) Question: What is included in the 5-acre threshold limit?

Answer: The 5-acre threshold limit includes all surface disturbances on a lease associated with a proposed action, such as an APD. In the case of an APD, the 5-acre threshold would include disturbances for construction of the well pad, roads, utilities, and production facilities.

Categorical Exclusion #3 Questions

(21) Question: Can CX #3 be used for proposed drilling actions relying exclusively on a RMP/EIS?

Answer: Yes, CX #3 can be used for proposed drilling so long as the drilling was analyzed as a reasonably foreseeable activity in the RMP/EIS and was analyzed within the last 5 years and it is within a developed field.

(22) Question: Does the use of CX #3 depend on the level of detail described in the RMP/EIS?

Answer: No, It does not depend on the level of detail described in the RMP/EIS. The statute makes no requirement of detail for use of this exclusion; only CX # 1 has a level of detail requirement.

(23) Question: CX #3 refers to drilling an oil or gas well within a developed field. What is the definition of a developed field?

Answer: For the purpose of applying this CX, a developed field is an area where a second well has been drilled and completed to confirm the oil or gas reservoir discovered by the initial well.

Categorical Exclusion #4 Questions

(24) Question: Can CX #4 be used for pipeline placement relying exclusively on a RMP/EIS?

Answer: Yes, CX #4 can be used for pipeline placement if the corridor was designated and approved in an RMP/EIS and that document was approved within the last 5 years.

(25) Question: Does the use of CX #4 depend on the level of detail described in the RMP/EIS?

Answer: No. The statute does not specify or require any level of detail for application of CX #4.

(25) Question: Do the statutory CXs apply to off-lease ROWs?

Answer: CX #4 applies to any ROW either on or off lease if they are granted under the authority of the MLA. CW #4 does not apply when seeking approval under other authorities. However, the use of existing corridors approved under other authorities may be used for placement of pipelines under CX #4.